IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 9598 of 2000
with
CIVIL APPLICATION No.8715 of 2000
in
SPECIAL CIVIL APPLICATION No 9598 of 2000

For Approval and Signature:

HON'BLE MR.JUSTICE JAYANT PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

CHHAGANBHAI KALUBHAI MALI

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 9598 of 2000
MR AJAY R MEHTA for Petitioner No. 1-18
MR PRACHCHHAK, Ld. AGP for Respondent No. 1-2
RULE SERVED BY DS for Respondent No. 2
MR RN SHAH for Respondent No. 3
MR PC KAVINA for Respondent No. 4-9

CORAM : HON'BLE MR.JUSTICE JAYANT PATEL

Date of decision: 19/04/2005

ORAL JUDGEMENT

1. The short facts of the case are that the petitioners, who are claiming the status as vegetable merchant, have approached this Court for challenging the order passed by the Collector dated 28.8.2000, whereby various directions are given, inter alia, to collect difference of the market price as per the Rules in response to the shops which are allotted to Respondents No.4 to 9. As per the case of the petitioners, Chora Building at which the shopping centre is constructed is required to be used for vegetable market and not for any other purpose. It appears that respondent No.3 Municipality had passed the resolution for construction of Santrampur Urban Development Coop. Bank Limited Vegetable Market. Thereafter, the building was constructed and so far as Respondents No.4 to 9 are concerned, the Municipality passed the resolution No.149 dated 30.7.1998, whereby the Municipality resolved for accepting the development amount as Rs.40,000/= for the persons who were having cabins numbered and for unnumbered cabins it was agreed to accept the amount of Rs.55,000/= and it was also agreed to allot the shop on rental basis. It appears that the petitioners approached before the Collector under Section 258 of the Gujarat Municipalities Act (hereinafter referred to as the "Act") and the District Collector ultimately examined the matter and passed the order on 28.8.2000, whereby he found that the resolution of the Municipality dated 30.7.1998 vide No.149 could not have been passed by the Municipality before undertaking the process for disposal of the property in public interest. However, the Collector found that considering the financial position of the vegetable merchants, who are petitioners herein, it may not be possible for them to spend huge amount and he found that there is already a building of Dharmashala, where a separate vegetable market can be constructed and, therefore, ultimately so far respondents No.4 to 9 are concerned, the Collector directed that the difference of the development charge already paid and the market value which may be fixed as per the Rules be recovered from them within a period of six months and on that condition only the possession of the cabins be handed over. The District Collector also issued the direction to the Municipality for holding of the public auction by fixing the upset price in respect to ten other shops and for allotment on monthly rent. It is further directed by the District Collector in the said impugned order that whatever the development fund which may be realised from

the allotment of the shops be deposited in the separate bank account and the amount be utilised for the construction of vegetable market by using the building of Dharmashala and after planning of the same, the allotment will be required to be made as per the rules. It is under these circumstances, the petitioners have approached this Court by preferring this petition.

2. Before considering the rival submissions of the parties it deserves to be recorded that on 11.9.2000 this Court (Coram: P.K.Sarkar, J.) passed the following order:

"1. Heard learned counsel Mr. Ajay Mehta for the petitioners. Issue rule. Petitioners to take steps for service of rule on respondents within two days. Rule returnable on 3-10-2000.

2. I have also heard Mr. Mehta on interim prayer. It is submitted by Mr. Mehta that the Government has allotted certain land to the Santrampur Nagar Palika for construction of a vegetable marked. Accordingly a Resolution was passed as back in 1992 by the Nagar Palika for construction of vegetable market. Thereafter, during the progress of the construction, the Nagar Palika has taken another Resolution that instead of the vegetable market, the stalls will be allotted for the general market. It is submitted by learned counsel that the Nagar Palika has obtained donations for construction of vegetable market. Present petitioners are vegetable vendors and they have challenged the decision of the Nagar Palika on two counts, firstly the Nagar Palika should have started vegetable market in the newly construction building, and secondly the Nagar Palika has taken a Resolution to allot 7 cabins/ shops to 7 persons at a lower premium. In the case of the allottee a premium of Rs.55,000/- is to be paid, whereas in the case of 7 persons/ cabin holders it has been decided by the Nagar Palika to allot them shops at a premium of Rs.40000/-. Learned counsel also drawn my attention to the order of the Collector dated 28-8-2000 passed in Appeal No. 3/2000. The Collector in his order observed that, in the matter of taking a decision for allotment to 7 cabin holders, the procedure has not been followed by the Nagar Palika. It appears that the Nagar Palika has taken a decision to accept lower premium from the 7 cabin

holders and the matter requires an examination to ascertain why such a decision was taken by the Nagar Palika. The Collector, even though discussed in his order about procedural lapses, no finding has been given by the Collector. It is submitted by learned counsel for the petitioners that the Nagar Palika is making haste to give delivery of possession of all the 7 stalls to 7 cabin holders and it may be that, in the meantime one has already taken possession in the market.

3. I am of the view that, the matter needs thorough inquiry and accordingly the Collector, Panch Mahal district is directed to make an inquiry regarding the procedural lapses in the matter of allotment to 7 cabin holders by Santrampur Nagar Palika. The Collector may submit the report whether any favour has been shown to the 7 cabin holders and whether any irregularity has been committed by the said Nagar Palika in the matter of allotment of 7 shops to 7 cabin holders. The Collector may submit his report before this Court through Government Pleader agency on/or before 3-10-2000. In the meantime if the shops are not allotted/ handedover to these 7 cabin holders, same shall not be done till the next date. Registry is directed to supply a copy of this order to learned AGP Mr. Mukesh Patel and a copy of this order also be sent directly to the Collector, Panchmahal district. Over & above, a fax message in respect of present order be sent to the Collector, Panchamahal district at the cost of the petitioners by today itself. In addition, direct service permitted."

3. Therefore, by interim order the Collector, was directed to make an inquiry regarding the procedural lapse in the matter of seven cabin holders by Santrampur Nagarpalika. It was also ordered that in the meantime, if the shops are not allotted/handed over to these seven cabin holders the same shall not be done till the next date. Thereafter, on 3.10.2000 this Court (Coram: P.K. Sarkar, J.) passed further order, which is reproduced as under:

" I have heard Mr.Ajay R. Mehta, learned Counsel appearing on behalf of the petitioners and Mr. Asim Pandya, Ld. Addl. Central Govt. Standing Counsel, on behalf of the respondent

No.3, Nagar Palika. The learned Counsel, on behalf of the respondent, prays for time for filing counter affidavit. Learned Counsel, on behalf of the petitioner, has no objection, but he submitted that the interim order was passed on 11-9-2000, directing the respondents not to allot or hand over possession of the cabin shops, if those are not allotted/handed over to the seven cabin holders. Learned Counsel further submitted that inspite of that order, cabin shops are being allotted to these seven cabin holders. Learned Counsel, on behalf of the respondent, disputed this fact and submitted that before the order was passed on 11-9-2000, shops were already allotted. However, it is made clear that if the shops are not allotted, then the same shall not be allotted/handed over to these 7 cabin holders till the next date. The matter is ordered to be listed on 11-10-2000."

Hence, it was observed that if the shops are not allotted, then the same shall not be allotted/handed over to these seven cabin holders till next date.

Thereafter, on 23.8.2004, this Court (Coram: Jayant Patel, J.) passed the following order:

" 1. Heard Mr. Mehta for the petitioners, Mr. Kavina for the respondents No. 4 to 9 and Mr. Dave for the respondents No. 1 and 2.

2. Upon hearing the learned counsel appearing for the parties, it appears that by the impugned order dated 28.8.2000 passed by the Collector, it has been ordered to hold public auction of ten shops, and for 7 shops the difference is to be recovered.

3. For both the purposes, i.e either to maintain the order passed by the Collector or even for quashing of the order passed by the Collector, it is required to be brought on record the auction price of the property in question, and thereafter the matter can be further decided for passing consequential orders based on the same.

4. Mr. Kavina, learned counsel appearing for the respondents No. 4 to 9 submitted that the possession of the shops are already given by the President of the Municipality whereas Mr.

Mehta, learned counsel for the petitioner submitted that it is on account of the collusion by the President of the Municipality, the possession is handed over, and he submitted that as such, the respondents No. 4 to 9 have no specific right or privilege to be treated differently for the purpose of allotment of the shops.

5. In my view, the question regarding different treatment given by the Collector in the impugned order shall be considered later on, but with a view to arrive at a figure for ascertaining the market price of the property in question, the auction of all the shops are required to be held, and the said auction may not be finalized and may be placed before this Court for further orders.

6. Under the above circumstances, by further interim order, it is directed the Municipality, under the supervision of an officer who may be nominated by the District Collector, shall hold the auction of all 17 shops but shall not finalize the auction and shall submit the report of auction proceedings before this Court. It would be open to the officer holding the auction to accept the requisite amount towards participation in the auction. It is further made clear that till further orders, the possession of the aforesaid 7 shops which are said to be in physical possession of respondents No. 4 to 9 shall not be disturbed but the said possession shall be continued subject to further orders which may be passed by this Court in the petition. The aforesaid auction be completed within a period of six weeks from today.

7. S.O. to 1st October 2004 for passing further orders."

When the matter was thereafter considered on 27.10.2004, the following order was passed.

" Mr.Shah, learned Counsel places on record the advertisement of auction to be held under the supervision of Dy. Collector, Lunavada Prant, Lunavada. Mr.S.K.Rathod, Dy. Collector is present and he states that for participation in the auction each of the participants will be required to deposit Rs.25,000/= and once the

offer of any of the participants is accepted, he will go out of the zone of consideration and the remaining bidders will be allowed to participate.

2. Mr.Kavina, learned Counsel appearing for respondents No.4 to 9 submitted that it may be clarified that such auction may be held without prejudice to the rights and contentions of respondents No.4 to 9 in this petition and he also submitted that as respondents No.4 to 9 have already deposited the amount earlier of Rs.40,000/= towards development charges when the possession of the shops in question were handed over, respondents No.4 to 9 may be allowed to participate without depositing the amount of Rs.25,000/= which is the condition for other participants to submit their offer.

3. So far as the first part is concerned, the auction to be held as per the order dated 23.8.2004 is subject to the further orders which may be passed by this Court in this petition and, therefore, no separate clarification is required. The second request of Mr.Kavina cannot be accepted for the simple reason that if the respondents No.4 to 9 are asserting their right for the shops in question which are allotted by the Municipality earlier and if without prejudice to their rights and contentions in this petition, they are desirous to participate in the auction, they stand on the same position at par with the other participants at the auction and, therefore, if respondents No.4 to 9 are desirous to participate at the auction without prejudice to the rights and contentions in SCA No.9598/2004, it would be for them to comply with the conditions to deposit the amount of Rs.25,000/= at the time of participation.

4. S. O. to 4.11.2004 for reporting compliance of the earlier order. Direct service today."

4. As the first auction did not materialise positively, once again the matter was considered by the Court on 8.2.2005 and the following order was passed:

" This court after hearing the parties had passed the following order on 23.8.2004:

"1. Heard Mr. Mehta for the petitioners, Mr.

Kavina for the respondents No. 4 to 9 and Mr. Dave for the respondents No. 1 and 2.

2. Upon hearing the learned counsel appearing for the parties, it appears that by the impugned order dated 28.8.2000 passed by the Collector, it has been ordered to hold public auction of ten shops, and for 7 shops the difference is to be recovered.

3. For both the purposes, i.e either to maintain the order passed by the Collector or even for quashing of the order passed by the Collector, it is required to be brought on record the auction price of the property in question, and thereafter the matter can be further decided for passing consequential orders based on the same.

4. Mr. Kavina, learned counsel appearing for the respondents No. 4 to 9 submitted that the possession of the shops are already given by the President of the Municipality whereas Mr. Mehta, learned counsel for the petitioner submitted that it is on account of the collusion by the President of the Municipality, the possession is handed over, and he submitted that as such, the respondents No. 4 to 9 have no specific right or privilege to be treated differently for the purpose of allotment of the shops.

5. In my view, the question regarding different treatment given by the Collector in the impugned order shall be considered later on, but with a view to arrive at a figure for ascertaining the market price of the property in question, the auction of all the shops are required to be held, and the said auction may not be finalized and may be placed before this Court for further orders.

6. Under the above circumstances, by further interim order, it is directed the Municipality, under the supervision of an officer who may be nominated by the District Collector, shall hold the auction of all 17 shops but shall not finalize the auction and shall submit the report of auction proceedings before this Court. It would be open to the officer holding the auction to accept the requisite amount towards

participation in the auction. It is further made clear that till further orders, the possession of the aforesaid 7 shops which are said to be in physical possession of respondents No. 4 to 9 shall not be disturbed but the said possession shall be continued subject to further orders which may be passed by this Court in the petition. The aforesaid auction be completed within a period of six weeks from today.

7. S.O. to 1st October 2004 for passing further orders."

2. Thereafter, on 27.10.04, in connection with the very auction the following order was passed:

"Mr.Shah, learned Counsel places on record the advertisement of auction to be held under the supervision of Dy. Collector, Lunavada Prant, Lunavada. Mr.S.K.Rathod, Dy. Collector is present and he states that for participation in the auction each of the participants will be required to deposit Rs.25,000/= and once the offer of any of the participants is accepted, he will go out of the zone of consideration and the remaining bidders will be allowed to participate.

2. Mr.Kavina, learned Counsel appearing for respondents No.4 to 9 submitted that it may be clarified that such auction may be held without prejudice to the rights and contentions of respondents No.4 to 9 in this petition and he also submitted that as respondents No.4 to 9 have already deposited the amount earlier of Rs.40,000/= towards development charges when the possession of the shops in question were handed over, respondents No.4 to 9 may be allowed to participate without depositing the amount of Rs.25,000/= which is the condition for other participants to submit their offer.

3. So far as the first part is concerned, the auction to be held as per the order dated 23.8.2004 is subject to the further orders which may be passed by this Court in this petition and, therefore, no separate clarification is required. The second request of Mr.Kavina cannot be accepted for the simple reason that if the respondents No.4 to 9 are asserting their right for the shops in question which are allotted by

the Municipality earlier and if without prejudice to their rights and contentions in this petition, they are desirous to participate in the auction, they stand on the same position at par with the other participants at the auction and, therefore, if respondents No.4 to 9 are desirous to participate at the auction without prejudice to the rights and contentions in SCA No.9598/2004, it would be for them to comply with the conditions to deposit the amount of Rs.25,000/= at the time of participation.

4. S. O. to 4.11.2004 for reporting compliance of the earlier order. Direct service today."

3. Today, when the matter is further taken up, it has been reported by the learned advocate for the petitioner that because of some misconception on the part of the petitioner, no offers were submitted. Mr.Shah, Ld.advocate for the respondent-Municipality also submitted that the Municipality is desirous to readvertise for auctioning of the shops in pursuance of the earlier order passed by this court. Mr.Shah also further submitted that the Municipality is desirous to utilise the money as the property is lying idle. Kavina, Ld.counsel appearing for respondent Nos 4 to 9 resisted such course being adopted by the Municipality on the ground that the petitioner has prior right over seven shops which are in the possession of his clients and he wanted to make various submissions for supporting the stand that the case of the respondent Nos 4 to 9 who are in possession of seven shops stands on different footing and therefore those shops may not be ordered to be auctioned by the Municipality even if the Municipality is desirous to readvertise the auction. He also submitted that only 10 shops, i.e. remaining shops, barring shops which are in the possession of the respondent Nos 4 to 9 may be ordered to be auctioned. He submitted that earlier order, dated 23.8.04 and the subsequent order, dated 27.10.04 were the interim orders of the court and the court is not bound by such interim orders and the court may consider the contention of respondent Nos 4 to 9 once again before allowing the Municipality to readvertise or before ordering the reauction of the shops. He submitted that as now the respondent Nos 4 to 9

are ventilating the grievance as they were in the earlier petition being SCA No.12406/2000 the question may be examined once again by this court even for the purpose of passing interim order on the point as to whether the Municipality should be allowed to reauction all the shops or excluding the shops which are in possession of the respondent Nos 4 to 9.

4. In my view, there is no change in circumstances except the fact that the offers were not received at the time when the attempt was made by the Municipality for auction and therefore if the Municipality is desirous to make another attempt, it can not be said that the matter would be required to be considered, once again, for adopting same course which was ordered by this court earlier as per order dated 23.8.04 read with order, dated 27.10.04. The aforesaid is coupled with the circumstance that the respondent Nos 4 to 9 in pursuance of order, dated 27.10.04 without prejudice to the rights and contentions in this petition have also deposited amount of Rs.25,000/- each for enabling them to participate in the auction. Therefore, I find that it may not be required for this court at this stage to examine the various contentions which have been raised by Kavina for respondent Nos 4 to 9 for contenting the prior or special right which is claimed by respondent Nos 4 to 9. The said prior or special right over the shops which are in their possession would be considered by the court only at the time when further order is passed after the report of the auction is produced and the said aspect is also reflected in the earlier order, dated 23.8.04 passed by this court.

5. In view of the above, it is observed that the municipality shall be at liberty to readvertise for auction of all shops in pursuance of order, dated 23.8.04 read with the order, dated 27.10.04 passed in this petition and the Municipality may also permit those persons who have already deposited the amount for participating at the auction in addition to the new offers which may be received.

6. The aforesaid exercise shall be completed within a period of 5 weeks from today and report shall be submitted on 21.3.05.

7. The office to place the matter on 22.3.05
for passing further orders."

5. It appears that at the second auction the Municipality received the offers in respect to Shops No.1, 2, 3, 8, 9 and 10, which are allotted to Respondents No.4 to 9, except Shop No.6 allotted to Nitin Aswin Upadhyay. As per the affidavit filed by the Chief Officer of the Municipality dated 4.4.2005, (1) in respect to Shop No.1 which is allotted to Respondent No.7 herein, he has participated at the auction and price offered is of Rs.2,50,000/=; (2) in respect to Shop No.2 which is allotted to Respondent No.6 herein, he has participated and the price offered is Rs.2,50,000/=; (3) in respect to shop No.3 which is allotted to Respondent No.9 herein, the price offered is of Rs.2,30,000/=; (4) in respect to shop No.8 allotted to Respondent No.5 herein, the price offered is of Rs.2,30,000/=; (5) So far as shop No.9 is concerned, the present occupant who is allotted the shop has not participated, but one Dhalpat M. Lalchvani offered the price of Rs.2,50,000/=; (6) So far as shop No.10 is concerned, the occupant, who is allotted the shop has participated and offered Rs.2,50,000, but one Soni Pravin Chandra Dhansuklal has offered Rs.2,55,000/=. It appears that so far as shop No.6 is concerned, the upset price fixed is of Rs.2,85,000/= as per the report of the Chief Officer of the Municipality dated 2.11.2004 submitted after holding of the first auction.

6. Surprisingly, after the second auction in pursuance of the order dated 8.2.2005, the petitioners herein who were represented through Mr.Ajay R. Mehta, as stated by Mr.Mehta, had taken back the papers from the learned Counsel and, therefore, the learned Counsel Mr.Mehta wanted to withdraw his appearance and, therefore, on 22.3.2005 this Court passed the following order.

" In pursuance of the order passed by this
Court on 8.2.2005, Mr.Shah, learned Counsel appearing for the Municipality places on record the report of the auction.

2. Mr.Devang Vyas for Mr.Ajay R. Mehta
states that Mr.Mehta is desirous to withdraw his appearance on behalf of the petitioner and for such purpose communication is made by Mr.Mehta to his client by registered A.D. post, but the A.D. slip is not received back.

3. It appears from the report of auction proceedings that Respondents No.4 to 9 have participated in the auction, but no other offers have come forward in respect to other shops.

4. Mr.Kavina, learned Counsel for the respondents No.4 to 9 states that subsequently the said offers are withdrawn and, as per his say, respondents No.4 to 9 submitted the offers under compelling circumstances.

5. Under these circumstances, the Respondent Municipality is directed to place on record its stand for realisation of money from disposal of shops which may also include the shops for which the offers were made by Respondents No.4 to 9. The petitioner, if they are desirous to make alternative arrangement, may also do so. S.O. to 6.4.2005."

7. Today, Mr.Devang Vyas, learned Counsel appearing for Mr.Mehta submitted that the A.D. slip is already received back and, therefore, Mr.Mehta is withdrawing his appearance. It appears that the petitioners have not made any alternative arrangements. In normal circumstances, in absence of the petitioners, Court may dismiss the matter for default or for want of prosecution. However, considering the facts and circumstances referred to hereinabove and for the reasons as stated hereinafter, it appears that if the matter is dismissed for default, the cause pertaining to disposal of the public property, which has been interfered by the Court by several orders as referred to hereinabove may go unsettled. Further, in exercise of the power under Article 226 of the constitution, in a given case Court may not exercise discretion to dismiss the matter for default, but may further proceed to examine the matter, considering the larger issue involved in the petition. As such, the petition pertains to the manner and method adopted by the Municipality in allotment of the shops, which are public property by private negotiations and as the issue involved in the petition are touching to the mode of exercise of power by a Municipality, which is now given constitutional status as local government, I find that it would be just and proper not to dismiss the matter for default and to proceed for further examination of the matter on merits and, therefore, I have also heard the learned Counsel appearing for Respondents No.4 to 9, Mr.Kavina, Mr.R.N. Shah, learned Counsel appearing for Respondent No.3 Municipality and Mr.Prachchhak, learned

AGP for the State of Gujarat and the District Collector, on merits of the petition for passing the final order.

8. The first contention raised by the petitioners in the petition that the Municipality, having resolved for accepting the amount from the District Coop. Bank for establishing the vegetable market and the Municipality having resolved for construction of the vegetable market, cannot now be permitted to use the shopping centre for any other purpose than vegetable market is concerned, it appears that the District Collector has examined the matter and has not interfered with the said decision of the Municipality for using the building for the purpose other than vegetable market, except by giving directions to utilise the land for construction of the vegetable market at Dharmashala building. As such, in normal circumstances, the Municipality may be bound by its own resolution, but for use of the building, there cannot be any straight-jacket formula, nor can there be any complete ban for change of use of any public property. If the District Collector after examining the matter under Section 258 of the Gujarat Municipalities Act has found that the action of the Municipality for using the building for the purpose other than vegetable market does not deserve to be interfered with, I find no fault with the order of the District Collect to that extent.

However, so far as the utilisation of the amount which may be realised as development fund by allotment of the shops is concerned, it prima facie appears that the Collector in exercise of the power under Section 258 of the Act could not have directed for utilisation of the fund for construction of another vegetable market at Dharamshala building. As such, it has also been recorded by the District Collector in the impugned order that financial condition of the Municipality is not satisfactory and, therefore, the utilisation of the amount which may be received by the Municipality, could have been left to the Municipality itself for the other better public purpose also, but it appears that the construction of vegetable market at Dharamshala or at a different place could also be said to be one of the public purposes which may be required to be undertaken by the Municipality for establishing the market and, therefore, when the amount is ultimately to be used for a public purpose of vegetable market as per the directions No.3 and 4 of the District Collector, I find that since the consequence is not to make any further difference in the utilisation of the amount by the Municipality and as such the allotment is also to be made as per the rules to the Vegetable Merchants, the said direction does not

deserve to be interfered with.

9. The aforesaid is with the additional circumstances that even the petitioners have also not challenged the direction prohibiting the utilisation of the money for establishment of the vegetable market at Dharmashala building and as such the principal challenge of the petitioners is that the utilisation of the Chora building only for vegetable market and the allotment made.

10. If the matter is examined for the utilisation of the building for other than vegetable market is concerned, as observed earlier, it cannot be validly asserted by the petitioners that the building which is constructed by the Municipality cannot be utilised for the purpose other than vegetable market. The petitioners are claiming their right in capacity as vegetable merchant and if the petitioners are desirous to utilise to have the allotment of the shops and for doing the business of vegetable, they could have done so by participating at the auction for the shops which were being held in pursuance of the above referred interim orders passed by this Court. It appears that the petitioners have not submitted their offers at the time of auctions namely; first auction as well as at the second auction and as per Mr.Kavina, the petitioners have not even participated at the second auction and they have taken back the amount which was deposited by them at the time of first auction. In any case, even at the first auction, after depositing of the amount the petitioners have not submitted their offer and, therefore, it appears that though there was no prohibition of not to use the shop for the vegetable merchant, the petitioners have not participated at the auction and, therefore, it also appears that the claim of the petitioners that the whole building must be used for the purpose of vegetable market only does not appear to be bonafide and genuine. It appears that, in any case, there is no right demonstrated by the petitioners that the Municipality cannot permit the use of the building other than for vegetable market. It may be that the person who is allotted the shop or who may be allotted the shop may use the building for any lawful business which may be inclusive of the business of vegetable also, but merely because at some point of time the resolution was passed by the Municipality to establish the vegetable market, the same cannot be said as a complete ban on utilisation of the shops which may be constructed by the Municipality for no other purpose than vegetable market and, therefore, the claim which is asserted by the petitioners in the petition for using the

chora building exclusively for vegetable market cannot be sustained and the order of the Collector for not interfering with the said decision of the Municipality does not call for interference.

11. It appears that one of the contentions raised in the petition by the petitioners at para 3.13 is that seven cabin holders to whom the shops are sought to be allotted are sham persons and are got up by certain elements in the Municipality and the rights have been wrongly created, though no such rights is existent. The petitioners have also alleged that since these persons were favoured persons, who were to be accommodated at Chora building, their rights have been created and the Collector has failed to even consider the whole aspects and has confirmed the action of the Municipality in allotting the premises to the said seven persons.

Mr.Kavina, learned Counsel appearing for Respondents No.4 to 9 submitted that the occupants of the shops who are Respondents No.4 to 9 were already there over the land and they have allowed construction of the shopping centre on the basis of the resolutions of the Municipality for accepting the development amount of Rs.40,000/= and Rs.50,000/=. Mr.Kavina, learned Counsel also submitted that the cabins were in occupation of Respondents No.4 to 9 and, therefore, there was additional right with Respondent No.4 to 9 for allotment of the shops for a different treatment and the Municipality has also given a different treatment for such purpose. He submitted that it is true that the undertaking has been executed by Respondents No.4 to 9 to pay the difference between the amount of the market price as may be fixed and the development amount which is already paid as per the order of the District Collector. However, in his submission the market price as per the Rules cannot be auction price for which the offer is received by the Municipality. He also submitted that Respondents No.4 to 9, as per the earlier order passed by this Court were allowed to participate in the auction without prejudice to the rights and contentions in this petition and, therefore, the submission of the offer by Respondents No.4 to 9 may not operate as a bar to them to assert the right for the differential treatment in the matter of allotment of shops by the Municipality.

12. Mr.Kavina, learned Counsel for the petitioners attempted to submit that once the petitioners are not interested in the cause for prosecuting the petition, the petition can at the most be said as public interest litigation and, therefore, this Court may examine the

matter accordingly as per the roster.

13. The last contention on the part of Respondents No.4 to 9 through Mr.Kavina, learned Counsel is not only thoroughly hopeless, but it lacks bonafide. When petitioners were party to the proceedings in the impugned order the petition cannot be said as PIL. Once this Court, having examined the matter since 2000, and has interfered and has passed various orders, merely because the petitioners are not present, such can hardly be said to be a valid ground to contend that the petition can now only be treated as PIL. As such, there is no material produced on record to support the stand that the petitioners have shown desire to withdraw the petition. Merely because the litigant is not present cannot be a sufficient ground to conclude that he is not desirous to prosecute the petition. Even if the petitioner is not prosecuting the petition and wants to withdraw the petition, this Court, under Article 226 of the Constitution, can decline the withdrawal. When the withdrawal is declined, the very Court has to examine the matter and in view of the facts and circumstances and the reasons recorded hereinabove, I find that such contention of Mr.Kavina, if entertained, would result into encouraging the litigant to test the Court and then to raise frivolous contentions. Such contention as such was raised by Mr.Kavina during the course of dictation of judgement by this Court, after arguing the matter on merits and, therefore, considering the facts and circumstances, the said contention is rejected.

14. On the question of settled norms of disposal of public property, the law is settled in as much as in normal circumstances when any public properties is to be disposed of by a public body or a statutory body, the opportunity is required to be given to all interested persons similarly situated and, in any case, the attempt must be made to procure maximum price. As such, the action on the part of the Municipality of allotment of the shops by private negotiation cannot be said to be in consonance with the settled norms for disposal of the public property. It may be that respondents No.4 to 9 were in occupation and on account of such occupations of Respondents No.4 to 9, the Municipality may consider the request of those persons, but it appears from the record that no such attempts are made by the Municipality to give opportunity to all interested persons who are similarly situated by giving advertisement or otherwise. Even if the contentions of Mr.Kavina is considered for the purpose of examination, then also at the best the prior right could be considered by the Municipality, but

not at the cost of sacrificing the revenue or sacrificing the market price prevailing at the time of allotment. It appears that the Collector has also, in the impugned order, found that the Municipality was required to undertake the process as required under the rules for disposal of the property. However, while issuing the direction No.1, in respect to Respondents No.4 to 9 the District Collector has left it to the fixation of market valuation as per the rules. As such on the date when the District Collector passed the order there was only an allotment and the possession was not handed over to Respondents No.4 to 9. It was required for the District Collector to direct the Municipality to first ascertaining the market valuation and the payment of the said amount and thereafter only the possession could have been ordered to be handed over. The District Collector has committed apparent error in allowing the possession to be handed over on condition to recover the amount within a period of six months. It also appears that there is no express order to hand over the possession first upon the undertaking and to recover the amount thereafter but the Municipality has interpreted the order accordingly. In the present case, as it has transpired from the record and there is no dispute on the point that upon the undertaking given by Respondents No.4 to 9, the President of the Municipality has already handed over the possession to Respondents No.4 to 9 and such undertaking is for payment of the difference as per the order of the Collector. In any case, as the possession of the shops in question is already handed over upon the undertaking of Respondents No.4 to 9 to pay the difference of the amount as per the order of the Collector and, therefore, Respondents No.4 to 9 are, in any case, liable to pay the market price as per the Rules.

The contention raised by Mr.Kavina that the market price as per the Rules is not the same as that of upset price or is not the same as that of auction price offered, cannot be accepted for the simple reason that the upset price is being fixed by the valuation department of the Government and the upset price is a minimum price which must be fetched if the properties are to be disposed of at the auction. Therefore, in any case, the market valuation even as per the order of the Collector cannot be less than the upset price. Further, if the offer is received of a shop at the auction, more than the upset price, such can reasonably be construed as the market price for the purpose of concluding that the prevailing rate of a property is at the auction. The contention raised on behalf of the Respondents No.4 to 9 that there is a separate language used by the Collector

in directions No.1 and 2 for fixation of market price as per the Rules and for holding of the auction for other 10 shops in direction No.2 suggests that the price to be recovered from Respondents No.4 to 9 is at a lesser amount than the auction price, cannot also be accepted, because so far as Respondents No.4 to 9 are concerned, the allotment made by the Municipality is accepted by the Collector and since the allotment was accepted and the fixation of the development charge was interfered with, it has been ordered to recover the difference of the market price and the development charge already collected. So far as other 10 shops are concerned, as the allotment was yet to be made, the fixation of upset price and auction was ordered. In my view, in directions No.1 and 2 the only difference lies qua the confirmation of right of allotment and there is no difference so far as mode of disposal of the property at a market price is concerned. Further, if at the auction which is held pending the petition in pursuance of the above referred order passed by this Court, the offer received is higher than the upset price, there is no reason for this Court to ignore the said aspect for arriving at the conclusion of the amount of market price of the shops in question which are allotted to Respondents No.4 to 9. Even if the allotment is to be maintained as per the order of the Collector, the upset price fixed of the shops in question which are allotted to Respondents No.4 to 9, qua the shops for which no offer is received at the auction, the same is not sufficient to conclude that the market valuation of the property is less than the upset price. For the purpose of fixation of the market valuation of the property ultimately this Court would be guided by the Body of the Experts for valuation. As the upset price fixed of shop No.6 is of Rs.2,80,000/=, the market price can be said as the upset price plus reasonable rate of interest at the rate of 12 % from the date of fixation of the upset price till actual payment.

15. It appears that the petitioners of this petition have also allowed to continue with these proceedings for some time and thereafter at the time when the actual auction took place, as observed earlier, they have not submitted their offer for participation at the auction. Not only that, but after the second auction, for the reason best known to them, the petitioners have shown non-interest in the proceedings by not even making alternative arrangement. There may not be any compulsion on the part of any litigant to prosecute to continue with the proceedings, but at the same time when this Court interfered since 2000 and the action of the Municipality for allotment of the shops is stalled, it was expected

for the petitioners to make their stand clear on the said aspects. One cannot be allowed to continue with the court proceedings as a jolly-ride and if such litigations are leniently viewed, it may result into encouraging the unscrupulous litigants to pursue the proceedings and thereafter back out for the extraneous reasons. I find it proper to leave the matter at that stage, without observing further, but it does appear from the record that on account of two auction proceedings in pursuance of the earlier order passed by this Court in this petition, it must have resulted into expenses to the Municipality as well as to the State authorities. So far as shops which are allotted to Respondents No.4 to 9 are concerned, it may stand on a different footing, but had the petitioners been genuinely interested for allotment of the other 10 shops, they could have participated at the auction. Therefore, considering the facts and circumstances, it appears that it would be just and proper to direct the petitioners to pay the cost of auction incurred by the Municipality plus the cost of auction incurred by the State Authorities, if any.

16. In view of the aforesaid, following directions deserve to be issued:

16.1) The impugned order passed by the collector dated 28.8.2000 so far it relates to allotment of the shops to Respondents No.4 to 9 are concerned, the same shall stand modified to the extent that for maintaining the allotment of shops No.1, 2, 3, 8, 9, and 10, the market price shall be the highest amount offered at the auction of the concerned shop and the person concerned from amongst Respondents No.4 to 9 shall be required to pay the difference to the Municipality between the highest offer received and the amount already paid.

16.2) So far as shop No.6 is concerned the allotment made shall be maintained on fixation of amount of upset price of Rs.2,80,000/= plus interest at the rate of 12% from the date of fixation of upset price until the actual payment.

16.3) It is further directed that all the concerned allottee who are represented as Respondents No.4 to 9 shall complete the payment within a period of six months, and such payment shall be made in six equal monthly instalments payable on or before 10th day of each month and the first instalment shall become due on or before

10.6.2005.

16.4) It is further made clear that in the event of failure on the part of the concerned allottee to pay the amount fully or of the instalment due, it would be open to the Municipality to take proper proceedings for the eviction in accordance with law.

16.5) The Municipality shall be at liberty to proceed for disposal of the other remaining 10 shops after holding the public auction by following settled principles of disposal of public property on the basis of the upset price which is already fixed of the shops concerned or a fresh upset price in case there is any reasonable delay in holding of the public auction, but in the latter case the prior approval of the District Collector shall be required to be taken by the Municipality and such action shall be supervised by the Office who may be nominated by the District Collector not below the rank of Dy. Collector.

16.6) The petitioners shall also pay the cost of auction already incurred by the Municipality for holding two auctions in pursuance of the interim orders passed by this Court and the petitioners shall also pay the expenses, if any, incurred by the Office of the District Collector for the aforesaid auction which were held in pursuance of the interim order passed by this Court. The amount of recovery shall be quantified by the Officer of the Municipality or the District Collector, as the case may be, and after intimation of the actual amount, the petitioner shall be required to make the payment within a period of one month from such intimation. In the event the amount is not paid, the District Collector or the Municipality, as the case may be, shall be at liberty to recover the amount in accordance with law, in addition to the proceedings which may be initiated for non-compliance of the order of this Court.

17. The petition is partly allowed to the aforesaid extent. Rule made absolute accordingly. Cost for the cause.

18. In view of the order passed in the main Special Civil Application, the Civil Application would not survive and shall stand disposed of accordingly.

19-4-2005 (Jayant Patel, J.)

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